IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 78

JOSEPH M. TAUSSIG, *Petitioner,*

vs.

HONORABLE JOHN P. BARNES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS, *Respondent.*

BRIEF OF AMICUS CURIAE.

MURAL J. WINSTIN
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Chicago, Illinois
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Scheffer Printing Company, Del. 7171

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Mural J. Winstin and Horace A. Young, attorneys for plaintiffs, Ruth Saxelby, J. Robert Saxelby, Jr., Lois Saxelby and Joyce Muriel Saxelby in the case of *Ruth Saxelby, et al.* v. *Joseph M. Taussig, et al.*, No. 45 C. 2271, in the District Court of the United States for the Northern District of Illinois, Eastern Division, ask leave to file a brief as *amicus curiae.* The consent of the Petitioner is filed herewith and a copy of his consent is attached hereto as Appendix A. The Respondent has stated that he does not wish to consent but that he has no objection to the filing of a brief by *amicus curiae.*

As attorneys for plaintiffs, Mural J. Winstin and Horace A. Young, consider it their professional duty to present a brief to this court and they believe that the brief presented herewith will be helpful to the court in the disposition of this matter.

BRIEF OF AMICUS CURIAE.

Foreword.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (Rec. 333-337) is a well reasoned opinion. It is a full and complete answer to all contentions of the petitioner made in his petition in the Circuit Court of Appeals (Rec. 5-29), and in his memorandum brief in support thereof (Rec. 32-36).

If petitioner had submitted his petition for certiorari to this court on the basis of the legal theories contained in his memorandum brief in the Circuit Court of Appeals we would not have asked leave to file a brief as *amicus curiae*. However, petitioner has the habit of shifting theories as he passes from court to court and under these circumstances we deem it appropriate to point out some of the errors, inconsistencies and fallacies of those theories and to show this court that he is not entitled to the extraordinary writ of mandamus.

The Issues Narrowed.

In the Circuit Court of Appeals petitioner relied for relief upon the theory that the District Court lacked jurisdiction upon four grounds, namely, (1) plaintiff Saxelby, while invoking jurisdiction on the ground of diversity of citizenship at the same time appeared and actively participated in proceedings involving the same object matter in

the Probate Court of Cook County, Illinois; (2) necessary parties were omitted in the District Court proceedings; (3) a proper alignment of parties would place Minnesota and Illinois citizens on both sides of the litigation and preclude diversity jurisdiction; and (4) one of the orders sought to be vacated and expunged involved property under the sole and exclusive jurisdiction of the Cook County Probate Court (Rec. 33-35 and 333-334). The Court will note that in his petition for certiorari petitioner has not mentioned grounds (1), (2) and (4) and therefore, must be considered as having abandoned those grounds. He relies here solely upon ground (3), namely, that a proper alignment of parties would place Minnesota and Illinois citizens on both sides of the litigation and preclude diversity jurisdiction.

The Issue Here

Thus narrowed, the sole issue here may be stated as follows:

Where the District Court in the exercise of its judicial discretion has denied the motions to realign certain defendants will mandamus lie to correct the alleged errors of the District Court?

The Pertinent Facts.

We will not attempt here to restate the pertinent facts. They will be found in the opinion of the Circuit Court of Appeals (Rec. 333-337).

Certain facts omitted from the petition for certiorari will be stated herein in connection with the relevant arguments with appropriate record references.

Reasons Why the Petition for Certiorari Should Be Denied by This Court.

For sake of orderly procedure we shall follow the form of the brief contained in the petition, first answering the points and arguments made there and adding such points and arguments of our own as we deem appropriate.

I.

The decision of the Seventh Circuit Court of Appeals is not in conflict with the decisions of the other Circuit Courts of Appeals on the same matter.

Petitioner infers, but does not state, that the decree entered June 4, 1947, by Judge Barnes was a preliminary decree, and that the time for appeal has not yet arrived. We do not consider the decree entered June 4, 1947, a preliminary decree but on the contrary, consider it a final, appealable decree. If, as petitioner infers, it is only a preliminary decree then his petition in the Circuit Court of Appeals and his petition here are both premature.

Grable v. *Killits*, 282 F. 185 (cert. den. in *Bacon Bros. Co.* v. *Grable*, 260 U. S. 735) is cited for the proposition that the Sixth Circuit Court of Appeals reached a conclusion opposite to that reached by the Seventh Circuit Court of Appeals in the case at bar. We do not find any conflict. In that case the District Court never obtained jurisdiction over the persons of the defendants for the reason that all of them lived outside the territorial jurisdiction of the court and when ordered to appear they made timely objections under their special appearances. In this case all of the defendants appeared generally and Judge Barnes had jurisdiction over the person of each and every one of them.

The case of *Barber Asphalt Pav. Co.* v. *Morris* (C. C. A. 8th, 1904), 132 Fed. 945, is not contrary to the decision

of the Circuit Court of Appeals for the Seventh Circuit in the case at bar but, in fact, is entirely in harmony with it. The general rule as to mandamus is admirably stated in that case at page 956, as follows:

> "It is undoubtedly the general rule that *a court has no power by writ of mandamus to compel a subordinate judicial officer to reverse a conclusion already reached, to correct an erroneous decision, or to direct him in what particular way he shall proceed or shall decide a specified question.* But it is equally a part of this general rule that the court always has power by means of such a writ to compel such an officer to proceed to try and decide a controversy within his jurisdiction, or to perform any other plain duty imposed by law." (Emphasis added.)

In the case before him Judge Barnes has not refused to proceed. He proceeded with dispatch, disposed of the dilatory motions, determined that the real interests of the parties did not require realignment of the parties, denied the motions to dismiss, tried the case and entered a final decree.

Neither do we find any conflict in the case of *In re Dennett*, 215 Fed. 673 (C. C. A. 9, 1914). In the first place, all the Court there decided was that the order to show cause should be issued. There is no showing that the writ of mandamus was ever issued. There the alleged lack of jurisdiction of the District Court consisted of the vacating of an order after expiration of the term, a matter in which the District Court had no discretion. Here the alleged lack of jurisdiction is because Judge Barnes denied the motions to realign parties, a matter in which he had the power to decide whether the interests of those defendants were on the plaintiffs' side of the case or on the defendants' side of the case.

Petitioner has failed to show that the decision of the Seventh Circuit Court of Appeals conflicts with the decision of any other Circuit Court of Appeals.

II.

The decision of the Seventh Circuit Court of Appeals is not in conflict with the applicable decisions of this court.

A. There is no comfort for petitioner in *Marbury* v. *Madison*, 1 Cranch 137. One of the best known facts of all American history is that in that case the writ was sought to be directed, not to a court, but to James Madison, Secretary of State, a member of the executive department of the government. Furthermore, the writ of mandamus was there refused because it was not in aid of the appellate jurisdiction of the court. Likewise, here what petitioner seeks is not aid to assist him in an appeal to the Circuit Court of Appeals but rather he seeks to have the decree of the District Court expunged and the complaint dismissed. That is not in aid of an appeal. That is a substitute for an appeal.

United States v. *United States District Court*, 68 S. Ct. 1035, merely authorized mandamus to enforce a mandate.

The decision of this court in *Ex Parte Crane*, 5 Pet. 190, is not in conflict with the decision of the Circuit Court of Appeals. In that case this court held that it had power to issue mandamus to a circuit court of the United States, commanding that court to sign a bill of exceptions, in a case tried before such court. Such a writ was properly issued in aid of appellate jurisdiction because the lower court refused to act.

Petitioner also cites 3 Bl. Comm. 111, and quotes therefrom. The quotation is plucked out of the context. The preceding sentence (which gives the proper background and meaning to the quotation) is as follows:

"It issues to the judges of any inferior court, commanding them to do justice, according to the powers of their office, *whenever the same is delayed.*" (Emphasis added.)

The case of *In re Winn*, 213 U. S. 458, is distinguishable from the case at bar. There the writ was awarded because the lower court had no question upon which it could exercise judicial discretion, but this court recognized a different rule in cases where the lower court exercises judicial discretion. At page 468, this court said:

"Whenever the record, including the petition for removal, shows that these are questions of fact upon whose determination the right of removal depends and upon which it is the duty of the Circuit Court to pass judicially, then there is jurisdiction to decide those questions. Their decision is the exercise of judicial discretion and if that discretion is erroneously exercised it can be corrected only by a writ of error or appeal. *In these cases writs of mandamus must not be permitted to usurp the functions of writs of error or take their place where they offer an adequate remedy to the aggrieved party.*" (Emphasis added.)

In the case at bar, the question as to whether the interests of the defendants, Ella Robitshek, Leo Taussig and Leontine Robitshek were of such nature that they should be realigned as parties plaintiff was a question which involved the exercise of judicial discretion. Judge Barnes actually exercised that discretion and as we have heretofore shown, properly exercised it.

In spite of what petitioner says, we say that all that *McClellan* v. *Carland*, 217 U. S. 268, holds is that mandamus may be issued in aid of appellate jurisdiction.

Ex Parte United States, 287 U. S. 241, was an original petition for mandamus in this court. The grounds for the decision are stated at page 246, as follows:

> "We prefer, however, to put our determination upon the broader ground that, even if the appellate jurisdiction of this court could not in any view be immediately and directly invoked, the issue of the writ may rest upon the ultimate power which we have to review the case itself by certiorari to the circuit court of appeals in which such immediate and direct appellate jurisdiction is lodged."

The decision rests upon aid to appellate jurisdiction. It is not in conflict with the decision in the case at bar.

Petitioner cites and quotes from *In re Metropolitan Trust Co.*, 218 U. S. 312, 314. There the trial court entered an order vacating its decree after the expiration of the term. Its order was, of course, a nullity and mandamus was properly issued to enforce the mandate of the higher court.

B. The District Court was not without jurisdiction.

The first point made by petitioner under IIB of his brief is wholly misleading. *Ex Parte Crane* is discussed above. That case does not hold that where the District Court is without jurisdiction, the cause is *coram non judice* and every act done is a nullity. This phrase *coram non judice,* of which petitioner is apparently very fond, inasmuch as he uses it on every possible occasion (Rec. 29), does appear in the report of *Ex Parte Crane* but it appears on page 201, in *the dissenting opinion.*

Neither *Elliott* v. *Peirsol,* 1 Pet. 328, nor *Griffith* v. *Frazier,* 12 U. S. 1, turned on a question of lack of diversity of citizenship. In *Elliott* v. *Peirsol,* the decree of the County Court of Woodford County, Kentucky was held void because the subject matter of the decree was not within its statutory jurisdiction. In *Griffith* v. *Frazier,*

the South Carolina ordinary appointed an administrator of the personal property in an estate where there was already an executor appointed and acting. Of course, that order was void.

In *Ex Parte Bradley,* 7 Wall. 364-367, there was a complete lack of jurisdiction of the subject matter, that is, the lower court had attempted to disbar an attorney for a contempt committed not before it but before another court. In the case at bar the District Court has undisputed jurisdiction of the subject matter.

Likewise in *Virginia* v. *Rives,* 100 U. S. 313, there was complete lack of jurisdiction of subject matter.

D. L. & W. R. R. v. *Rellstab,* 276 U. S. 1, is another case where the District Court attempted to vacate a judgment after expiration of the term and a complete lack of jurisdiction. It has no application to the case at bar.

At page 11 of his petition for certiorari the petitioner says:

> "The purported waiver of the rights of appeal of petitioner and other parties to the preliminary decree should not affect in any way the questions presented to the Circuit Court of Appeals or to this Court. The parties have themselves ignored the purported waiver for the nullity that it is; * * *"

This extraordinary statement gives us opportunity to point out to the Court these pertinent and highly significant facts: The waiver and release of the rights of appeal (Rec. 294) was signed by petitioner in consideration of plaintiff agreeing to withdraw and actually withdrawing her petition to remove petitioner as Executor in the Probate Court of Cook County (Rec. 282-293). An order was entered pursuant to that agreement (Rec. 300-301).

And a few days thereafter without objection by plaintiff (Rec. 302-303) petitioner's account was approved, which included the allowance of a fee of $15,000.00 for services as Executor.

Attached hereto as Appendix B, are two letters from petitioner to Mural J. Winstin, attorney for plaintiffs, dated July 3, 1947, and July 10, 1947, respectively, which plainly show that the allowance of a fee of $15,000 to petitioner was an important part of the transaction whereby petitioner waived his rights of appeal. As a part of that same transaction plaintiffs conceded that the attorneys' fees when allowed should be allocated equally to the four trusts instead of solely against the trust of which petitioner is beneficiary (Rec. 297-298), as plaintiffs might have insisted.

An examination of Appendix B shows that the question of the amount of fees to be allowed to attorneys for plaintiffs and the question of whether or not attorneys for plaintiffs had a contract with their client did not enter into the transaction. On the contrary, it shows that all references to attorneys' fees were stricken out by delineation.

We do not believe that this Court will consider that agreement a nullity. Plaintiff gave up valuable rights and petitioner received substantial consideration.

Plaintiff has not treated the agreement as a nullity. She has carried out her end of the bargain. Petitioner is the one who has treated it as a nullity or to put it bluntly: He has reneged.

C. The District Court had judicial power and discretion to determine whether any of the defendants should be aligned as plaintiffs and exercised that discretion.

Whenever a court is confronted with the problem of aligning parties that court must decide where the real interests of the parties lie. The court has the power to make that decision and uses its discretion in making that decision. To be more analytical, what the court does is this: It considers all the facts and circumstances which indicate that the interests of the defendant are similar to that of the plaintiff and it considers all the facts and circumstances which indicate that the interests of the defendant are adverse and antagonistic to the plaintiff, then in the exercise of that mental faculty of comparison known as judgment the Court arrives at a decision to align the defendant as a plaintiff or at a decision that the defendant remains a defendant. That is what the trial court did here.

Now what facts and circumstances as to defendant, Leo Taussig, did the District Court have before it?

First, the Last Will and Testament of Maurice Taussig, Deceased (Rec. 65, 72), which showed that the trust provided for Leo was an overriding interest; second, the fact that the guardian ad litem appointed for Leo never asked to become a party plaintiff and never contended that he should be a plaintiff; third, the fact that Leo had died on February 17, 1947, prior to the trial, that his death had been suggested of record (Rec. 168) and that the first suggestion that he should have been a plaintiff was made in the motion filed on May 19, 1947 (Rec. 190-191); and fourth, the Court had before it these arguments from the brief of plaintiffs:

> "The Court will recall that under the will Leo Taussig had a preferred position and was to receive $5,000

a year before any other beneficiary received anything. The plaintiff, Ruth Saxelby, was and is a beneficiary for life and her children were and are remaindermen. The testimony shows that the Woodlawn and University Property has a net income sufficient to pay Leo Taussig $5,000 a year. His interest was limited to $5,000 a year and, therefore, had no interest in securing the return of the Drexel Property to the trust. The interest of Leo Taussig and the interest of plaintiff, Ruth Saxelby, are as different as night and day or as black and white. That fact was realized by the guardian ad litem, who in conversation with counsel for plaintiff, emphasized the preferred position of his ward. * * *.

"The Court will recall that these defendants stoutly maintained that by making the Drexel deal they saved the Woodlawn and University Property from a deficiency decree and thus saved a valuable portion of the estate for the support of Leo.

"We submit that it does not lie in the mouth of these defendants to say that Leo should have been a party plaintiff. Furthermore, he never was a party plaintiff. He died on February 19, 1947, prior to the trial and his death was suggested of record prior to the trial. He cannot now be made a party plaintiff. One fact that these defendants, in their desperation, have overlooked and that is that, first, there must be a realignment of parties and, second, the order dismissing for lack of diversity. They cite no case showing that a deceased party can be realigned. We believe there is no such case. Failing in their effort to realign the motion to dismiss must also fail.

"Even if a deceased person could be realigned this Court is not required to relinquish jurisdiction of this cause. The defendant, Leo Taussig, can be dismissed and jurisdiction is thereby established with retroactive effect. In the case of *Dollar S. S. Lines* v. *Merz,* (C. C.

A. 9th, 1934) 68 F. 2d 594, Judge Mack said at page 593:

"'Where because of the joinder of proper, though not indispensable parties as defendants, there is not merely on the record but in fact, no such diversity of citizenship as to give jurisdiction, the District Court may permit a dismissal of such parties and thereby establish jurisdiction with retroactive effect. (Citing cases.) This procedure may be followed even after a verdict against all parties has been returned; moreover judgment could then be entered against the remaining parties on the original verdict.' (Citing cases.)

"The motion to dismiss the cause should be denied. The defendant, Leo Taussig, should be dismissed as a party defendant."

What facts and circumstances did the trial court have before it as to the interests of defendant, Ella Robitshek? First, that she moved to dismiss on the sole ground that necessary and indispensable parties were not joined (Rec. 82); second, that in her answer (Rec. 147-152) she admitted that she had full knowledge of all the proceedings in the Probate Court of Cook County (Rec. 148), denied that the conveyance of the Drexel Property was without notice to them (Rec. 148), denied that there was any violation by Joseph M. Taussig of his duties as trustee (Rec. 148), denied that Joseph M. Taussig had wrongfully or improperly converted the Drexel Property to his own use and benefit (Rec. 149), denied that Joseph M. Taussig had misappropriated, misused and converted to his own use moneys belonging to the trust (Rec. 150) and prayed that the complaint be dismissed (Rec. 151); and third, the fact, that both in her pleadings and in the trial of the case she took a position adverse, hostile and antagonistic to plaintiffs. Her attorney, Vance C. Smith, Jr., Esq., sat at the

table with counsel for the principal defendants, participated with them and at the conclusion of the trial made the following statement on behalf of his client, Ella Robitshek, whose interests petitioner says are not antagonistic to plaintiffs (Transcript of Proceedings, March 15, 1947):

> "If the Court please, I should like at this time to make a very brief statement on the position of the Defendants Rose Goodman and Ella Robitshek.
>
> "Mr. Winstin has suggested here that the reason neither of those two Defendants have joined with the Plaintiff in this action is because they are subject to the control of one or the other of the trustees.
>
> "Now, with regard to that, admittedly there is a close relationship existing here, which relationship has not been sufficient to prevent the Plaintiff, Ruth Saxelby, from bringing this action.
>
> "Furthermore, I would like to point out that throughout these proceedings, not merely during the trial but during the entire action, both Ella Robitshek and Rose Goodman have been represented by independent counsel. Furthermore, Rose Goodman has been represented by a Chicago attorney, Mr. Silvertrust since 1933, which is almost the very inception of this trust. So much for the question of control.
>
> "Now, your Honor, Rose Goodman and Ella Robitshek are now and have been in the past acquainted with the matters that have been the subject of this controversy. *They believe that the actions taken by Joseph Taussig have been in the best interests of this trust estate, and they approve of those actions.*
>
> "*More specifically, they do not feel that either Irving Robitshek or Joseph Taussig should be removed as trustees of this trust. They do not feel that the Drexel property should be restored to the trust.*" (Emphasis added.)

Before the trial court and here plaintiffs point out that in

such a situation, where the defendant takes an adverse, antagonistic and hostile position, she cannot be realigned as plaintiff. There we cited and here we cite the applicable cases.

In *Hodgman* v. *Atlantic Refining Co.*, (1921) 274 F. 104, the District Court of Delaware said, at page 105:

> "The jurisdiction of this court is founded only on the fact that the suit is between citizens of different states. Judicial Code, § 24 (Comp. Stat. § 991). As both defendants are alleged to have engaged in the challenged transaction and the Delaware corporation *takes of record a position antagonistic to that of plaintiffs*, the latter company may not, for jurisdictional purposes, be realigned or regarded otherwise than as a defendant." (Emphasis supplied.)

In *Doctor* v. *Harrington*, (1904) 196 U. S. 579, 25 S. Ct. 355, 49 L. Ed. 606, Mr. Justice McKenna said, at page 587:

> "The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation may be made subservient to some illegal purpose. If the controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal Court."

This ruling was followed and quoted with approval in *Howard* v. *National Telephone Co.*, (C. C. W. Va. 1910) 182 F. 215 at 220.

In the case of *Cutting* v. *Woodward*, (1918) 255 F. 633, the Circuit Court of Appeals for the Ninth Circuit said:

> "The trust company raises the question of jurisdiction, asserting that the company is not an adversary party to the plaintiffs in the suit, but is the real party in interest as plaintiff, and that consequently there

is no diversity of citizenship. But this is not a case in which the trust company, although made a defendant, should be realigned as a plaintiff, as in *Hames* v. *New York Railways,* 244 U. S. 266, 274, 37 Sup. Ct. 511, 61 L. Ed. 1125. *Here the attitude of the trust company is hostile to the plaintiffs.* It appeared in a joint answer with the appellant and by the same counsel, *and it denied the allegations of the bill and prayed for the dismissal thereof.* The cause is therefore one in which plaintiffs are citizens of California. *Doctor* v. *Harrington,* 196 U. S. 579, 25 S. Ct. 355, 49 L. Ed. 606. *Venner* v. *Great Northern Railway,* 209 U. S. 24, 28 S. Ct. 328, 52 L. Ed. 666." (Emphasis supplied.)

Moore Federal Practice under the New Federal Rules, Vol. 2, pp. 2136 and 2137:

> "If parties are not properly aligned, as where one party is made a defendant where in truth and in fact he is not adverse to the plaintiff or vice versa, the court will realign the parties according to their interests, before determining diversity.
>
> "Before making said realignment, however, the courts make certain *that the real interest* is determined *rather than some apparent interest.*"

In this connection Moore Federal Practice cites *Hirsch* v. *Stone,* C. C. A. 5th, 62 F. (2) 120 (Cert. Den.), 289 U. S. 747.

In the *Hirsch* case (*supra*) the trustee was antagonistic to noteholders under the trust; it was held that in a noteholders' action against the obligor, the trustee was properly a defendant and should not be realigned.

In *Sutton* v. *English,* 246 U. S. 199, the Supreme Court held that it was error to align one of the defendants with the plaintiff for jurisdictional purposes *where her interest was adverse to the plaintiff on one of four points.*

We, therefore, submit that Judge Barnes not only had the power to decide the motions to dismiss in the exercise of his judicial discretion but also that he properly exercised that discretion.

III.

The law of mandamus is already well settled by this Court.

Under Point III of his brief the petitioner says that the Seventh Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court. He cites no cases.

As a matter of fact, an examination of the decided cases shows that exactly the opposite is true and that the law of mandamus as applied to cases such as the case at bar is already well settled by this Court.

The law is well stated in the case of *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26, 27, 28, as follows:

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Ex parte Peru, supra* 584, and cases cited; *Ex parte Newman,* 14 Wall. 152, 165-6, 169; *Ex parte Sawyer,* 21 Wall. 235, 238; *Interstate Commerce Comm'n.* v. *United States ex rel. Campbell,* 289 U. S. 385, 394. Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal. *Ex parte Harding,* 219 U. S. 363, 369; cf. *Stoll* v. *Gottlieb,* 305 U. S. 165; *Trienies* v. *Sunshine Mining Co.,* 308 U. S. 66."

> "Ordinarily mandamus may not be resorted to as

> a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record."

The case of *Ex Parte Harding*, 219 U. S. 363, is exactly in point here. In that case the petitioner sought a mandamus to reverse the action of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in taking jurisdiction over a cause as the result of a refusal to grant a request of the petitioner to remand the case to a state court. In that case, as here, it was alleged that the trial court was without jurisdiction. The petition for mandamus was denied and the Court said, at page 369:

> "The doctrine that a court which has general jurisdiction over the subject matter and the parties to a cause is competent to decide questions arising as to its jurisdiction, and therefore such decisions are not open to collateral attack, has been so often expounded (see *Dowell* v. *Applegates*, 152 U. S. 327, 337, and cases cited), and has been so recently applied (*Hine* v. *Morse*, 219 U. S. 493), that it may be taken as elementary and requiring no further reference to authority."

The filing of the petition for mandamus in the Circuit Court of Appeals and the filing of the petition for certiorari in this court constitutes a collateral attack upon the decree of the District Court. That such a decree is immune from collateral attack is one of the most firmly established doctrines of this court.

In *Des Moines Navigation & Railroad Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, this Court was called upon to resolve a controversy over the effect of a judgment of the federal courts in a matter beyond their jurisdiction and based upon diversity of citizenship. This Court as-

sumed that the exercise of jurisdiction by United States Circuit Court over two Iowa corporations was improper. Nevertheless, it was held that the decree entered by the lower Court was a "prior adjudication of the matters in controversy."

The *Des Moines* case was cited and approved in *Gottlieb* v. *Stoll*, 305 U. S. 165, at 173-175. In the latter case, after an exhaustive study of the cases, Mr. Justice Reed, speaking for the Court, at page 176, said:

> "It is frequently said that there are certain strictly jurisdictional facts, the existence of which is essential to the validity of proceedings and the absence of which renders the act of the court a nullity. Examples with citations are listed in *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165. For instance, service of process in a common law action within a state, publication of notice in strict form in proceedings *in rem* against absent defendants, the appointment of an administrator for a living person, a court martial of a civilian. *Upon the other hand there are quasi-jurisdictional facts, diversity of citizenship, majority of litigants, and jurisdiction of parties, a mere finding of which, regardless of actual existence, is sufficient. As to the first group it is said an adjudication may be collaterally attacked, as to the second it may not.*" (Emphasis added.)

IV.

There is no occasion for the exercise of this Court's power of supervision in this case.

An examination of the record of this case in the Circuit Court of Appeals shows that petitioner received the respectful consideration of that Court. His motion for leave to file his petition for an order to show cause why mandamus should not be allowed, was allowed (Rec. 326). The

opinion of the Court (Rec. 333-337) shows that all of the contentions made by petitioner had careful consideration. There is no need for any supervision by this Court.

Under this point petitioner persists in his fallacious statement that the District Court on the face of the record was without jurisdiction by reason of a lack of diversity of citizenship. As painstakingly pointed out in this brief the record before this Court shows no such thing. *What it does show is that Judge Barnes, in the exercise of his judicial power and discretion decided that the interests of the various defendants did not require them to be realigned as plaintiffs.* That point was preserved by the decree entered June 4, 1947, and could have been raised by appeal from that decree. No piecemeal appeal was necessary.

The record here (p. 167) further shows that Chicago Title and Trust Company was made a third-party defendant to the action before Judge Barnes. The third party complaint filed by Joseph M. Taussig, individually, was based on the owner's title guarantee policy issued pursuant to the letter of opinion which appears at pages 303-311 of the record and sought a recovery of $80,000. In a separate decree which made findings and conclusions as to jurisdiction identical with those made in the decree of June 4, 1947, here complained of, Judge Barnes denied recovery and that decree is on appeal to the Circuit Court of Appeals for the Seventh Circuit. In other words, petitioner is now in the Circuit Court of Appeals seeking to recover $80,000 relying upon the very same jurisdiction which he here assails.

This entire lack of integrity by a member of the Bar is shocking enough but it is matched by his previous performance in these related matters, his scandalous miscon-

duct in extracting the Drexel property from the family trust and concealment of the material facts from the plaintiff, his sister, the waiver of the right of appeal for a fair consideration and then reneging on that agreement and persisting in that line of misconduct by the filing here of his petition for certiorari.

CONCLUSION.

This Court has said in the case of *Stoll* v. *Gottlieb*, 305 U. S. 165, at 172:

> "It is just as important that there should be a place to end as there should be a place to begin litigation."

We respectfully and earnestly submit that this litigation ought to be ended here and now by the denial of the petition for writ of certiorari.

Respectfully submitted,

Maxwell J. Winetin

Howard A. Yo

Amicus Curiae.

Appendix A.

In the Supreme Court of the United States
October Term, 1948

No. 78

Joseph M. Taussig, Petitioner,

vs.

Honorable John P. Barnes, United States District Judge for the Northern District of Illinois.

CONSENT.

The undersigned hereby consents to the filing of a brief herein by Mural J. Winstin and Horace A. Young, as *amicus curiae*.

S/ JOSEPH M. TAUSSIG,
Petitioner.

Appendix B.

Law Offices
JOSEPH M. TAUSSIG
29 South LaSalle Street
Chicago 3

July 3, 1947.

Mr. Mural J. Winstin,
33 South LaSalle St.,
Chicago, Illinois.

Dear Mr. Winstin:

Enclosed herewith are the following papers:

1. Waivers and releases executed by Irving H. Robitshek, Ella Robitshek and Irving H. Robitshek, Jr., wherein and whereby the aforesaid Robitsheks waive and release all rights to have reviewed by bill of review, appeal, etc., the reasonableness and fairness of the amount of the fees to be allowed to plaintiffs

for services of their attorneys in the matter of Ruth Saxelby, et al., versus Joseph M. Taussig, et al., filed in the U. S. District Court for the Northern District of Illinois.

2. Waiver executed by the same parties herein whereby they waive and release all errors, etc. in connection with the decree in favor of plaintiffs entered on June 3, 1947.
3. Waiver and release similar to No. 1 aforesaid executed by Joseph M. Taussig, Rose Goodman and Leontine Robitshek.
4. Waiver and release similar to No. 1 aforesaid executed by Joseph M. Taussig, Rose Goodman and Leontine Robitshek.
5. Waivers and release similar to No. 1 aforesaid executed by Alvin Goodman and Alvin Goodman, Jr.
6. Waiver and release similar to No. 2 aforesaid executed by Alvin Goodman and Alvin Goodman, Jr.
7. Letter of direction to The Northern Trust Company in connection with any indebtedness due the Taussig Estate by Alvin W. Goodman, et al.
8. Form of agreement between Ella Taussig Robitshek, Ruth Taussig Saxelby, Rose Taussig Goodman and Joseph M. Taussig in connection with the claim for household goods.
9. ~~Form of agreement between Joseph M. Taussig and Ruth Taussig Saxelby.~~
10. Stipulation in connection with citation proceedings now pending in the Probate Court.

Numbers 1 to ~~4~~ 6 are delivered with the understanding JMT
that your client, Ruth Taussig Saxelby, or you where it is MJW
for you to do as her attorney, will execute and deliver JMT
Items ~~5~~ 7 to ~~8~~ 10 inclusive or if not the same documents others containing substantially the provisions thereof, and should it be deemed by me necessary and expedient in order to fulfil the intent and purposes contained in this letter and enclosures to have the descendants of Ruth Taussig Saxel-

by execute similar documents then in that event she will obtain the same; and with the further understanding that Items 1 to 4 inclusive will not be filed, exhibited to Chicago Title & Trust Co. used, nor considered as delivered unless an appeal be taken in said Federal Court Proceedings, it being understood that an appeal taken either by me, the American National Bank & Trust Company of Chicago, as trustee, under trust agreement dated January 14, 1940, and known as Trust Number 4954, third party plaintiffs (or the successor trustees) versus The Chicago Title and Trust Company of Chicago, third party defendant shall not be such an appeal as to justify the filing of Items 1 to 4 inclusive aforesaid.

~~These documents are delivered with the further understanding that in the event the Federal Court shall see fit to allow the plaintiffs for services of their attorneys or the attorneys themselves a sum in excess of $50,000.00 then you and your co-counsel will file a remittitur and will remit all sums in excess of $50,000.00 so allowed.~~

Will you please acknowledge receipt of the enclosures upon a copy of this letter.

Thanking you for your courtesy and cooperation, I am

Yours very truly,

JOSEPH M. TAUSSIG.

JMT:an Encs.

July 10, 1947.

Mr. Mural J. Winstin,
11 S. LaSalle St.,
Chicago, Illinois.

Dear Mr. Winstin:

Supplementing my letter with respect to paragraph "9" on page 2 and subsequently referred to in the last paragraph wherein it is said that "Ruth Taussig Saxelby or

you, as her attorney, will execute and deliver items 7 to 10 or if not the same documents others containing substantially the provisions thereof", referring particularly to the above numbered paragraph "9" and the above quotation, in lieu of said requirement in respect to said paragraph "9", it is understood that the aforesaid requirement is cancelled and in lieu thereof it is understood that Ruth Taussig Saxelby will on behalf of herself and said plaintiffs in the cause filed in the District Court of United States, for the Northern District of Illinois, 0astern Division, entitled Ruth Saxelby, et al., v. Joseph M. Taussig, et al., and by the Clerk of said Court numbered Civil Action 45 C 2271, cause to be filed a petition executed by her, in which there shall be contained in the prayer thereof:

> "Plaintiffs pray that an order may be entered herein allowing plaintiffs * * * as fees for services of their attorneys herein, and said order provide that said allowance shall become a lien, be paid and charged against Trusts "E", "F", "G" and "H" under the Last Will of Maurice Taussig, deceased."

And with the further understanding that Ruth Taussig Saxelby and her descendants will not object to but will consent to the allowance to me the sum of $15,000 as additional executor's fees in the matter of the Estate of Maurice Taussig, deceased, now pending in the Probate Court of Cook County. When said $15,000 shall be paid or credited to me I agree forthwith to pay Ruth Saxelby the sum of $3750. This $3750 shall be in full settlement of any and all claims Ruth Taussig Saxelby may have against me in connection with Larchmont and New Rochelle properties.

Yours very truly,

(Signed) J. M. Taussig.

Accepted this 10th day of July, 1947.

Mural J. Winstin.